

A HIGHER PUBLIC PURPOSE? THE CONSTITUTIONALITY OF MISSISSIPPI'S PUBLIC TRUST TIDELANDS LEGISLATION

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TABLE OF CONTENTS

I. INTRODUCTION	6
II. PUBLIC TRUST LAW IN MISSISSIPPI	7
III. MISSISSIPPI'S RESPONSE	9
A. Commission on Public Trust Tidelands	9
B. History of Legislation	11
C. Summary of the Final Public Trust Tidelands Legislation	13
D. Background of Current Litigation	16
IV. SUMMARY OF THE LEGAL ARGUMENTS TO THE CHANCERY COURT IN SUPPORT OF TIDELANDS LEGISLATION	20
A. Purposes of the Public Trust Under State Law	20
B. No Donation Because Legislation Serves Higher Public Purpose	22
C. Secretary of State Has Authority to Determine the Public Trust Boundary Based Upon the Common Law	23
D. The Legislation Is Not Severable	23
E. Disastrous Consequences of Ruling of Unconstitutionality	24
V. SUMMARY OF LEGAL ARGUMENTS TO THE CHANCERY COURT IN OPPOSITION TO TIDELANDS LEGISLATION	24
A. The Legislation Constitutes a Conveyance of Trust Properties to Private Persons in Violation of the Public Trust Doctrine	24
B. Public Trust Tidelands Cannot Lawfully Be Conveyed to Private Persons for Private Purposes	25

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The authors would like to thank James Nelson and Margaret Bretz of the Mississippi Secretary of State's Office, and Helen Wetherbee of the Mississippi Attorney General's Office for their kind assistance in providing us with source materials and other information. This article has been produced in cooperation with the Mississippi-Alabama Sea Grant Consortium under administration of Grant No. NA89AA-D-SG016 from the U.S. National Oceanic and Atmospheric Administration Office of Sea Grant in the U.S. Department of Commerce. Responsibility for the views and content of this article is, of course, entirely our own.

C. The Law Conflicts with the Mississippi and United States Constitutions	26
1. No Donation of Public Property to Private Parties	26
2. Tidelands Legislation Violates Due Process	27
D. The Legislation Constitutes a Conveyance in Violation of the State's Fiduciary Duty as Trustee	27
E. Those Portions of the 1989 Tidelands Legislation That Are in Conflict with the Constitution Must Be Declared Void	28
VI. OPINION OF THE CHANCERY COURT	29
VII. ANALYSIS	30
A. Constitutional Issue	31
B. Common Law Public Trust	34
VIII. CONCLUSION	36

I. INTRODUCTION

Upon entry into the United States in 1817, Mississippi acquired title to and sovereign trusteeship responsibilities over its coastal tidelands.¹ The issue of the geographic boundary of these public trust tidelands reached the Mississippi Supreme Court first in 1857,² and then re-emerged in the 1980's when the State and a private landowner separately executed oil and gas leases to the same coastal property.³ In 1988, the United States Supreme Court resolved that dispute in favor of the State, in the process affirming the Mississippi Supreme Court's long-held position that state public trust lands encompass all lands under navigable and non-navigable tidal waters below mean high tide.⁴ Proponents of public rights in coastal waters heralded this decision, *Phillips Petroleum Co. v. Mississippi*,⁵ as finally resolving the issue and paving the way for a coherent resolution of coastal boundary disputes. However, their celebration was short-lived as the 1989 Mississippi Legislature muddled the waters with legislation directing the Secretary of State to delineate the public/private coastal land boundary in a manner inconsistent with the United States Supreme Court's decision⁶ and, arguably in contravention of article 4 section 95 of the Mississippi Constitution, which prohibits the state from donating public lands to private corporations or individuals.⁷ As a result, the State is in court once again and is in an interesting litigation posture. A private party and the

1. The state's claimed right to these lands stems from the "equal footing" doctrine which assures that states created after original formation of the Union entered with the same legal rights and duties of the original thirteen states. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472-74 (1988); see *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221-23 (1845).

2. *Martin v. O'Brien*, 34 Miss. 21 (1857); see also *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938).

3. *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, *reh'g denied*, 486 U.S. 1018 (1988).

4. *Phillips Petroleum Co.*, 484 U.S. at 476.

5. 484 U.S. 469 (1988).

6. Miss. CODE ANN. § 29-15-7 (Supp. 1989).

7. Miss. CONST. art. 4, § 95.

State of Mississippi have asked the court to direct the Secretary of State to follow the legislature's mandate.⁸ The Secretary of State has taken the position that to do so is both unconstitutional and inconsistent with the United States Supreme Court's ruling.⁹ Thus, the State of Mississippi is in an adversarial position with itself.

The first court opinion (issued by the Chancery Court of Harrison County) upheld the 1989 tidelands legislation.¹⁰ The expected appeal has been filed. Thus, for the second time in three years, the Mississippi Supreme Court has before it an issue of critical importance to the evolution of Mississippi public trust law. Its decision will test the scope of the state's authority under the constitution to alienate public lands to the private sector at no charge. And the case carries important political ramifications as well.

This article delineates the issues at stake in the current controversy and suggests a desirable outcome from both legal and policy viewpoints. After a brief discussion of the *Phillips Petroleum Co.* decision, the article examines the political response that led to the current controversy and presents the main arguments of the litigators. It then analyzes the most important legal issues and recommends a resolution that would overturn the tidelands legislation.

II. PUBLIC TRUST LAW IN MISSISSIPPI

In *Phillips Petroleum Co.*, the United States Supreme Court affirmed a Mississippi Supreme Court decision establishing the high water mark as the inland boundary of state coastal public trust tidelands.¹¹ The dispute had its genesis in passage of the Coastal Wetlands Protection Act¹² which charged the Mississippi Marine Resources Council (later reorganized into the Bureau of Marine Resources) with, among other things, preparing maps identifying state-owned coastal wetlands.¹³ Based on the boundaries established by these maps, Mississippi's Mineral Lease Commission leased oil and gas rights in 600 acres of tidelands to Saga Petroleum U.S. Inc., although record title already belonged to Cinque Bambini Partnership and Phillips Petroleum Company.¹⁴ The property in question was part of a larger tract that was settled in the late 18th century and since used by a succession of landowners.¹⁵ It consisted of largely undeveloped marsh, lake, and

8. See Brief of Plaintiff, William D. Byrd, *Byrd v. State*, No. 17,789 (Ch. Ct. of Harrison County, Miss.); Brief of Defendant, State of Mississippi, *Byrd v. State*, No. 17,789 (Ch. Ct. of Harrison County, Miss.). On appeal to the Mississippi Supreme Court, No. 90TS692. Copies are on file with the Mississippi College Law Review.

9. See Brief of Counter-Plaintiff, Secretary of State of Mississippi, *Byrd v. State*, No. 17,879 (Ch. Ct. of Harrison County, Miss.). On appeal to the Mississippi Supreme Court, No. 90TS692. Copy is on file with the Mississippi College Law Review.

10. *Byrd v. State*, No. 17,879, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990).

11. *Phillips Petroleum Co.*, 484 U.S. at 469.

12. MISS. CODE ANN. §§ 49-27-1 to -69 (SUPP. 1989).

13. *Cinque Bambini Partnership*, 491 So. 2d at 511.

14. *Id.*

15. *Id.*

tributary streams within the Jourdan River drainage area.¹⁶ Located several miles from the Gulf Coast and primarily non-navigable, the land was nevertheless subject to the ebb and flow of the tide.¹⁷ Titleholders of record had paid property taxes for approximately 150 years.¹⁸ No one questioned the private ownership until the state issued leases in 1977.¹⁹

Following the State's action, Cinque Bambini and Phillips Petroleum filed suit to remove clouds from their titles.²⁰ The Chancery Court ruled that, under the public trust doctrine, the state owned approximately 140 acres.²¹ On appeal to the Mississippi Supreme Court, Cinque Bambini argued that the public trust property boundaries were legally redefined in a series of cases beginning with *Martin v. Lessee of Waddell*²² to include only those waters navigable in fact in 1817, making tidal influence irrelevant.²³ Consequently, because the contested property was never used for commercial navigation or even capable of such use, it should not be included within the state's public trust. The State counterargued that the cases cited by Cinque Bambini did not restrict the "ebb and flow" test in tidal areas, but actually expanded the trust to include both tidelands and inland navigable waters.²⁴

After finding that federal rather than state law controlled the question of what lands were given to the state in trust upon its entrance to the Union, the Mississippi Supreme Court rejected Cinque Bambini's navigable-in-fact theory.²⁵ It offered a more illustrative explanation of the ebb and flow test by describing it in terms of a sail hoisted upon a toothpick.²⁶ As long as a tiny object like a toothpick is capable of floating continuously at mean high tide from a navigable body of water to a point inland, the waters traversed and the lands beneath are within the boundaries of the public trust.²⁷

Finally, after deciding that state law controlled the ownership of tidal areas created subsequent to statehood, the court excluded from the public trust two lakes within the Cinque Bambini holdings that were artificially created as a result of highway dredging operations.²⁸ The public trust tidal area finally awarded to the

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Cinque Bambini Partnership Co. v. Mississippi, No. 14,178, slip op. (Ch. Ct. of Hancock County, Miss. Apr. 28, 1982).

21. *Id.* In his opinion, the Honorable William L. Stewart stated:

The Public Trust Doctrine in Mississippi has always held that the State of Mississippi is the absolute owner of the soil and of the minerals therein contained and in the beds of all its shores, arms and inlets of the sea wherever the tide ebbs and flows, as Trustee for the people of the State; and, as Trustee, cannot convey the title to the land beneath such waters below the mean high water mark in fee simple.

Id. at 32.

22. 41 U.S. (16 Pet.) 367 (1842).

23. *Cinque Bambini Partnership*, 491 So. 2d at 513.

24. *Id.* at 513-14.

25. *Id.* at 514.

26. *Id.* at 515.

27. *Id.* at 516.

28. *Id.* at 520.

State amounted to forty-two acres underlying the north branch of Bayou LaCroix and eleven small drainage streams.²⁹

In affirming the Mississippi Supreme Court's decision, the United States Supreme Court held that states, upon entry to the Union, received all lands subject to the ebb and flow of the tides regardless of actual navigability.³⁰ The Court foresaw difficulties in delineating the boundaries of public tidelands if Phillips Petroleum's navigable-in-fact theory was adopted.³¹ It assented to Mississippi's claim that the ebb and flow rule has the benefit of uniformity and ease of application and was unpersuaded by alternative delineating methods offered by Phillips.³² It rejected Phillips Petroleum's argument that the decision would be "inequitable" by upsetting property expectations and interests of coastal landowners who have paid taxes on their lands for over a century.³³ Because cases that have addressed Mississippi's public trust interests in the past had described uses of them not relating to navigability (such as bathing, swimming, recreation, fishing, and mineral development), the Court found that those owning property in tidal areas should reasonably have known that the State's claims were not limited to lands under navigable waterways.³⁴

III. MISSISSIPPI'S RESPONSE

A. *Commission on Public Trust Tidelands*

On June 23, 1988, in response to the United States Supreme Court's decision in *Phillips*, Mississippi's Secretary of State Dick Molpus³⁵ established a Blue Ribbon Commission on Public Trust Tidelands to guide the state in its efforts to produce a sound and equitable tidelands leasing program.³⁶ The Commission consisted of twenty-six specially-appointed members from a variety of backgrounds and occupations.³⁷ Representatives from a number of state agencies were called upon to serve as technical support staff and to answer questions from Commission members and the general public.³⁸ In addition, an administrative staff of four, headed

29. *Id.* at 510.

30. *Phillips Petroleum Co.*, 484 U.S. at 476.

31. *Id.* at 480.

32. *Id.* at 481.

33. *Id.* at 481-84.

34. *Id.* at 482.

35. In Mississippi, the Secretary of State is charged by law with protection of public trust lands. MISS. CODE ANN. § 7-11-11 (Supp. 1990).

36. See Nelson, *Public Trust Tidelands in Mississippi: Title Wave Hits the Gulf Coast*, Proceedings of the Eighth Annual Submerged Lands Management Conference, South Padre Island, Tex. at 5 (Oct. 1-6, 1989) [hereinafter Nelson]. Copy is on file with the Mississippi College Law Review.

37. Lawyers and elected officials seem to be disproportionately represented. A breakdown of the members' occupations reveals the following: five lawyers; seven elected officials; five business persons; one ex-state official; one hospital administrator; two college administrators; one environmental organization representative; and one minister. Only one member lived outside the coastal region. See generally Nelson, *supra* note 36, at 5. Copy is on file with the Mississippi College Law Review.

38. Nelson, *supra* note 36, at 6.

by the Assistant Secretary of State for Public Lands, was appointed to carry out day-to-day operations and to act as public liaison.³⁹

The Secretary of State submitted a list of specific questions for the Commission's consideration, but stressed that he placed no conditions or limitations on its work except to request that "members be fair, sensitive, and cognizant of the sweeping ramifications of its recommendations."⁴⁰ Each Commission member was assigned to serve on one of five committees—Boundaries, Littoral/Riparian Rights, Conservation and Development, Taxation, or Lease Program Management.⁴¹

The Commission, as a whole, met eight times from June through December.⁴² Its various committees met separately as required.⁴³ All meetings were open to the public with time set aside to answer questions from the audience.⁴⁴ To provide an opportunity for additional input, printed comment forms were distributed throughout courthouses, post offices, public buildings, and newspapers in the three coastal counties.⁴⁵ In August, an administrative office was established in Gulfport to coordinate Commission activities and to serve as a clearinghouse for the public.⁴⁶

Each committee was responsible for determining whether or not to address particular public trust issues within its assigned subject areas, as well as for developing procedures that would best ensure consensus.⁴⁷ Many committees requested that members of the technical support staff and outside experts testify on specific matters.⁴⁸ During each Commission meeting, committee chairpersons presented progress reports and fielded questions.⁴⁹

On November 18, 1988, the Commission published an interim report containing its findings and recommendations.⁵⁰ Prior to finalizing the report, public hearings were held on three successive evenings during late November.⁵¹ The Commission adopted its final recommendations on December 8, 1988.⁵² The

39. *Id.*

40. Minutes of First Meeting of the Blue Ribbon Commission on Public Trust Tidelands, at 3 (June 23, 1988). Copy is on file with the Mississippi College Law Review.

41. See Nelson, *supra* note 36, at 6-7.

42. Minutes of each of these meetings can be acquired from the Mississippi Secretary of State's Coast Office, P.O. Box 97, Gulfport, MS 39502-0097.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Interim Report, Blue Ribbon Commission on Public Trust Tidelands (adopted Oct. 25, 1988). Copy is on file with the Mississippi College Law Review.

51. See *supra* note 42.

52. Draft of Final Report, Blue Ribbon Commission on Public Trust Tidelands (adopted Dec. 8, 1988). Copy is on file with the Mississippi College Law Review.

recommendations were presented to the Secretary of State and were adopted, without change, in the form of administrative rules.⁵³

The final report contained over thirty specific recommendations.⁵⁴ A recitation of those recommendations is not necessary because most of the findings were incorporated into subsequent public trust legislation that will be discussed below.⁵⁵ For purposes of this article, the most important Commission recommendations were those directly related to the delineation of the public trust boundary. The Commission recommended that where the shore has not been developed, the boundary of public trust tidelands should be today's mean high tide.⁵⁶ Where the shore has been developed, the historical boundary should be determined using the earliest reliable data of the type admissible in a court of law.⁵⁷

B. History of Legislation

Upon release of the Public Trust Commission's final report, the Secretary of State aggressively sought comprehensive legislation that would track the Commission's recommendations. As trustee of Mississippi's public lands, he had a legal authority to implement some, but not all, of the recommendations put forward by the Commission.⁵⁸ Moreover, without a clear legislative mandate, he would have been forced to singly bear the political costs associated with carrying out the controversial tideland leasing program.

Many owners of coastal property were understandably concerned that they would have to relinquish title to the state. Other coastal citizens and businesses were worried that they would incur tremendous losses as divested property owners would seek recovery on warranty deeds from grantors or title insurance policies. Notwithstanding vigorous opposition by some coastal residents and legislators, bills authorizing a comprehensive public trust leasing program were introduced in both the House of Representatives and Senate during the 1989 legislative session.⁵⁹ House Bill No. 920⁶⁰ was sponsored by Representative Ray Vecchio, who served on the Blue Ribbon Commission on Public Trust Tidelands.

53. Report of the Blue Ribbon Commission on Public Trust Tidelands, presented to Secretary of State Dick Molpus, January, 1989 (adopted as Rules and Regulations for the Administration, Control and Leasing of the Public Trust Tidelands, January 20, 1989). Copy is on file with the Mississippi College Law Review.

54. *Id.*

55. A summary of the Commission's Recommendations can be found in Jarman & McLaughlin, *Public Trust in Mississippi: The Aftermath of the Phillips Petroleum Decision*, Proceedings of the Sixth Symposium on Coastal and Ocean Management, Charleston, S.C., July, 1989, 2593-97. Copy is on file with the Mississippi College Law Review.

56. Report of the Blue Ribbon Commission on Public Trust Tidelands at 4 (Jan. 1989).

57. *Id.*

58. For example, in the absence of specific legislative direction, revenues from state tideland leases would go directly into the general fund rather than to a specially designated fund for the management and protection of public trust tidelands. MISS. CODE ANN. § 49-27-69 (Supp. 1990). Legislation is also required to amend existing state law which places severe constraints on the maximum terms allowed under a tideland lease. MISS. CODE ANN. § 29-1-107 (Supp. 1990).

59. See *infra* notes 60-61.

60. H.R. 920, 104th Leg., Reg. Sess., 1989 Miss. (Substitute Bill).

Senate Bill No. 2780⁶¹ was sponsored by a coalition of senators representing coastal districts.

Although each bill generally tracked the Commission's recommendations, the two versions differed substantially. The House Bill delegated broad authority to the Secretary of State and followed the Commission's intent quite closely.⁶² The Senate Bill, in contrast, limited the Secretary's role and included several provisions contrary to the Commission's findings.⁶³

Most significantly, Senate Bill 2780 required that where coastal property is already developed, the boundary of those tidelands held in trust by the state should be delineated as the determinable mean high water line nearest the July 1, 1973, effective date of the Coastal Wetland Protection Law.⁶⁴ This provision is clearly contrary to the findings of the Commission which recommended that the boundary be determined by using "the earliest available reliable information of the type admissible in a court of law."⁶⁵ The Senate version would, in effect, alienate or convey from the public trust those tidelands that were developed prior to 1973.

The Senate Substitute Bill 2780 also contained a provision that declared it to be the law of the state that title to tidelands lawfully filled by the acts of a stranger, without the knowledge or acquiescence of the upland owner and which is contiguous to the upland property, accrues to the benefit of the upland owner.⁶⁶ If the fill was by the state or one of its subdivisions for use as a beach or protection of a seawall, the filled property would be subject to a permanent easement by the public.⁶⁷ This legislative declaration had great practical significance because much of Mis-

61. S. 2780, 104th Leg., Reg. Sess., 1989 Miss. (Substitute Bill).

62. See H.R. 920, 104th Leg., Reg. Sess., 1989 Miss. (Substitute Bill).

63. See S. 2780, 104th Leg., Reg. Sess., 1989 Miss. (Substitute Bill).

64. *Id.* at § 5(1).

65. See *supra* note 56.

66. *Supra* note 61, § 5(2).

67. *Id.* This provision was an attempt by the Senate to resolve legal confusion in the state of Mississippi over the ownership of property that was filled or pumped in by a stranger. In *Harrison County v. Guice*, 244 Miss. 95, 140 So. 2d 838 (1962), the Mississippi Supreme Court was asked to determine whether lands that were once subject to the public trust could inure to the upland owner when artificially filled. In *Guice* the county filled shallow bottoms below mean high tide, as well as upland on Guice's property, in order to protect Highway 90 and the seawall that separated it from the Mississippi Sound. The court ruled that where tidelands are filled in or pumped up by acts of a stranger to the upland title, the upland owner held title to these filled lands even though the accretions were created at public expense and the submerged land that was filled to make the beach previously belonged to the state. *Guice*, 244 Miss. at 107-10, 140 So. 2d at 842-43.

A federal district court decision arising from the same controversy as *Guice* came to the opposite conclusion. In *United States v. Harrison County*, 399 F.2d 485 (5th Cir. 1968), the court rejected the *Guice* holding, reasoning instead that article 4, section 95 of the Mississippi Constitution of 1890 supersedes the common law doctrine of accretion. *Id.* at 491. Section 95 reads: "Lands belonging to, or under the control of the state, shall never be donated *directly or indirectly* to private corporations or individuals." *Id.* Because of this provision, the court ruled, private upland owners cannot take ownership of formerly submerged lands. *Id.*

As a result of these and subsequent conflicting decisions, the status of ownership of man-made beaches on Mississippi's coast is still in doubt. A case presently on appeal to the Mississippi Supreme Court may address some of these inconsistencies. *Mississippi Highway Comm'n v. Gillich*, (No. 59605), involves the ownership of the sand beach directly south of the seawall, together with what, if any, riparian rights the plaintiff might have. For a more detailed discussion, see Jarman, *Of Time, Tidelands, and Public Trust*, 57 Miss. L.J. 131 (1987) and Wetherbee, *Recent Developments with Respect to Public Trust Tidelands in Mississippi*, Proceedings of the Eighth Annual Submerged Lands Management Conference, South Padre Island, Tex. (Oct. 1-6, 1989).

Mississippi's beachfront property was created as the result of seawall construction and sand replenishment projects beginning in 1915.⁶⁸

Finally, the Senate Substitute Bill 2780 provided a detailed statement of legislative findings of fact clearly at odds with the tone and intent of the Commission's report.⁶⁹ In a nutshell, these findings stated that the dispute and uncertainty over title to public trust tideland property had caused an incalculable loss of dollars and jobs to the coastal area.⁷⁰ The findings termed this situation intolerable and concluded that immediate resolution of the dispute would serve the higher public purpose.⁷¹ By declaring that the swift resolution of uncertainty over title served a higher public purpose than protecting the state's interest in its public trust tidelands, the Senate attempted to lay a legal foundation for alienating trust lands developed prior to 1973.⁷²

A conference committee made up of three members from each house met behind closed doors and negotiated a compromise bill that was signed into law effective March 31, 1989.⁷³ The final legislation deleted some sections that were objected to by the Secretary of State, such as the provision that awarded upland owners title to public trust property filled by a stranger.⁷⁴ However, Senate conferees refused to remove the controversial provision that requires the Secretary of State to delineate the boundary of developed public trust tidelands nearest to July 1, 1973.⁷⁵ They also rejected any attempt to change the legislative findings of fact contained in the preamble of Senate Bill 2780.⁷⁶

C. Summary of the Final Public Trust Tidelands Legislation

The stated purpose of the legislation is to favor the preservation of the natural state of the public trust tidelands except where a specific alteration of the tidelands would serve a higher purpose.⁷⁷ Resolution of the uncertainty and disputes that have arisen as to the location of the public trust boundary is declared to be in the higher public interest.⁷⁸ A preamble to the legislation states that disputes over title to public trust tidelands have created an intolerable economic situation along the Mississippi coast and that immediate resolution is required and would serve a

68. For a good discussion of the history of seawall construction and beach replenishment projects in Harrison County, Mississippi, see *United States v. Harrison County*, 399 F.2d 485, 487-88 (5th Cir. 1968).

69. See *supra* note 61, at § 2.

70. *Id.*

71. *Id.*

72. The legislative findings of fact play a significant role in the legal arguments presented in *Byrd v. State*, No. 17,879, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990). On appeal to the Mississippi Supreme Court (No. 90TS692).

73. Act approved Mar. 31, 1989, ch. 495, 1989 Miss. Laws 355 (codified in Miss. CODE ANN. § 29-15-1 to -23. (Supp. 1989)) [hereinafter referred to as tidelands legislation].

74. See Miss. CODE ANN. § 29-15-1. The final legislation simply provides that the state recognizes the common law doctrine as it applies to such lands. See *infra* note 86 and accompanying text.

75. See Miss. CODE § 29-15-1 to -23 (Supp. 1989).

76. See *id.*

77. Miss. CODE ANN. § 29-15-3(1) (Supp. 1989).

78. Miss. CODE ANN. § 29-15-3(2) (Supp. 1989).

higher public purpose.⁷⁹ The legislation declares that tidelands are held in trust for use by all of the people, but that the state also has the responsibility of protecting the common law and statutory rights of the littoral and riparian property owners.⁸⁰

The Secretary of State, in cooperation with other state agencies, is directed to prepare a "Preliminary Map of Public Trust Tidelands."⁸¹ The preliminary map will depict the public trust boundary of undeveloped tidelands as the current mean high water line.⁸² For developed shoreline, the boundary is to be "the determinable mean high water line nearest the effective date of the Coastal Wetlands Protection Act" (July 1, 1973).⁸³ Natural inland expansion of tide waters increases the land subject to the trust.⁸⁴ "[G]radual and imperceptible accumulation of land by natural causes [accretion] . . . [and] the increase of land by permanent withdrawal or retrocession of tidal waters by natural causes [reliction], diminish the land subject to the public trust"⁸⁵ In all other circumstances, "the state recognizes the common law doctrine as it pertains to such tidelands"⁸⁶ "After the preparation and publication of the certified preliminary map, . . . the [Mississippi] Bureau of Marine Resources is authorized and directed to conduct a comprehensive program of public trust tidelands mapping"⁸⁷

The preliminary map is to be posted at various locations within each coastal county for public inspection.⁸⁸ Following a sixty-day comment period, the Secretary of State has discretion to revise the map accordingly.⁸⁹ All revisions must be completed within twenty days of the end of the comment period, at which time the map will be formally adopted.⁹⁰ Within 120 days of final adoption, the Secretary of State must serve process on the property owners whose lands are subject to the public trust and are in violation.⁹¹ "The notice shall also inform occupants that after three (3) years, the boundary as set forth in the certified map shall become

79. See *supra* note 75. The preamble states that the Legislature finds that: certainty and stability of the land titles . . . along the shores of the tidally affected waters of the state are essential to the economic welfare of the state and to the peace, tranquility and financial security of the many thousands of citizens who own such lands The Legislature finds, in accordance with justice and sound policy, that resolving these problems in the manner herein set out would create far less harm and be of greater benefit to the state and its citizens in terms of preventing economic . . . loss of industry and loss of revenue to the state than any benefits which would be derived from any attempt to completely rectify unregulated wetlands use which has occurred in the past

Id.

80. MISS. CODE ANN. § 29-15-5 (Supp. 1989).

81. MISS. CODE ANN. § 29-15-7(1) (Supp. 1989).

82. *Id.*

83. *Id.*

84. MISS. CODE ANN. § 29-15-7(2) (Supp. 1989).

85. *Id.*

86. *Id.* This provision is an acknowledgement of the confused state of the law in Mississippi regarding ownership of public trust tidelands that have been filled by strangers. See *supra* note 31 and accompanying text.

87. MISS. CODE ANN. § 29-15-17(1) (Supp. 1989).

88. MISS. CODE ANN. § 29-15-7(3) (Supp. 1989).

89. MISS. CODE ANN. § 29-15-7(4) (Supp. 1989).

90. *Id.*

91. *Id.*

final unless the occupant has submitted a contrary claim”⁹² The affected property owners will “have six months to negotiate and settle differences with the Secretary of State,” although extensions may be granted.⁹³

If an affected property owner cannot settle a dispute with the Secretary of State as to the location of a boundary of the public trust within six months after notice, either party can file suit in the chancery court where the property is located.⁹⁴ In any judicial proceeding, the State has the burden of proving by a preponderance of evidence that the land is subject to the trust.⁹⁵ “Nothing in the [legislation] is intended to preclude any party from pursuing remedies otherwise available at law, . . . except that if no action is taken by the occupant within three years (3), . . . the boundary . . . shall become final.”⁹⁶

The legislation establishes a special “Public Trust Tidelands Fund” to be administered by the Secretary of State.⁹⁷ Revenue from lease rentals, except those derived from mineral leases, are to be transferred to the special fund.⁹⁸ The Secretary of State may use the funds to cover administrative costs only.⁹⁹ Any remaining funds “shall be disbursed pro rata to the local taxing authorities for replacement of ” ad valorem taxes.¹⁰⁰ Any funds that remain after distribution to local taxing authorities shall go “to the Bureau of Marine Resources for new and extra programs of tidelands management.”¹⁰¹

Once trust lands have been leased, the lessee is “responsible for any county or municipal tax levy upon the leasehold interest.”¹⁰² “All Public Trust Tidelands belonging to the State of Mississippi or any of its political subdivisions shall be exempt from ad valorem taxation.”¹⁰³ The maximum lease period of public trust lands is increased to forty years with an option to renew for an additional twenty-five years.¹⁰⁴ The holder of a lease has “a prior right, exclusive of all other persons, to re-lease” the property as agreed between the holder and the Secretary of State.¹⁰⁵ Each lease shall have rent adjustment every five years tied to the Consumer Price Index or appraisal, whichever is greater.¹⁰⁶ If the original rental was tied to ad valorem tax rolls, then rent review will likewise be tied to such tax

92. *Id.*

93. *Id.*

94. MISS. CODE ANN. § 29-15-7(5) (Supp. 1989).

95. *Id.*

96. MISS. CODE ANN. § 29-15-7(6) (Supp. 1989).

97. MISS. CODE ANN. § 29-15-9 (Supp. 1989).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. MISS. CODE ANN. § 29-15-11 (Supp. 1989).

103. MISS. CODE ANN. § 27-31-39 (Supp. 1990).

104. MISS. CODE ANN. § 29-1-107(2) (Supp. 1989). The method of calculating individual lease rentals is within the discretion of the Secretary of State and is not mentioned in the legislation. The Blue Ribbon Commission on Public Trust Tidelands did make certain recommendations in this area. See *supra* note 53, at 34-38. A summary of the recommendations can be found in Jarman & McLaughlin, *supra* note 55, at 2593-97.

105. MISS. CODE ANN. § 29-1-107(2) (Supp. 1989).

106. *Id.*

rolls.¹⁰⁷ If no agreement can be reached on a rental amount, "the lease may be cancelled at the option of the state."¹⁰⁸ Current occupants who developed public trust property after July 1, 1973, "shall pay an annual rental based on the fair market value" of the property.¹⁰⁹ Finally, all public projects that serve a higher public purpose are "exempt from any use or rental fees."¹¹⁰

D. Background of Current Litigation

The Secretary of State responded promptly to the tidelands legislation by requesting that the Mississippi Attorney General file a lawsuit on his behalf as trustee of the state's public trust tidelands.¹¹¹ The suit sought declaratory judgment on whether the statutory requirement to delineate the public trust boundary as the mean high water line nearest to July 1, 1973, was a violation of section 95 of the Mississippi Constitution of 1890, which reads: "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals"¹¹²

According to the Secretary of State, the tidelands legislation, as enacted, is in violation of Mississippi's Constitution and the common law as interpreted by the United States and the Mississippi Supreme Courts in the *Phillips Petroleum Co.* and *Cinque Bambini* litigation.¹¹³ He argued that, were he to delineate the boundary as mandated in the legislation, the title question would not be settled because private owners would still be subject to legal challenge based upon the court's rulings regarding state sovereignty, since 1817, over trust lands.¹¹⁴ He also contended that it would be a waste of state tax dollars to prepare a preliminary map based on the tidelands legislation only to have it struck down later in court.¹¹⁵

Because of the delay in settling individual boundary disputes as a result of the pending litigation, the Secretary of State implemented an imminent transfer program.¹¹⁶ Under this program, landowners whose situations require immediate relief or who do not wish to wait for further court decisions may split the cost of a

107. *Id.*

108. *Id.*

109. MISS. CODE ANN. § 29-1-107(3) (Supp. 1989). See also MISS. CODE ANN. § 49-27-1 (Supp. 1990).

110. MISS. CODE ANN. § 29-15-13 (Supp. 1989).

111. The action was originally filed on June 5, 1989, in the Chancery Court of Hinds County, Mississippi. *Byrd v. State*, No. 138681, slip op. (Ch. Ct. of Hinds County, Miss. June 5, 1989). This suit, in effect, pitted the State of Mississippi against itself and created the unusual situation in which the Mississippi Attorney General had to represent both plaintiff and defendant in the action. This conflict was resolved by appointing an attorney from the Attorney General's office to represent the Secretary of State and an outside counsel to represent the State of Mississippi.

112. MISS. CONST. art. 4, § 95.

113. See generally Nelson, *supra* note 36, at 12. The author, James O. Nelson, II, is Assistant Secretary of State for Public Lands. Copy is on file with the Mississippi College Law Review.

114. *Id.* The most likely scenario would be a legal challenge by an environmental organization or other citizen's rights group interested in making sure that the state's public trust tidelands remain under public control.

115. *Id.*

116. Press Release from Office of the Mississippi Secretary of State (May 23, 1989). In Secretary of State Molpus' Press Release, he provided that an application for affected property owners could be obtained from the Secretary of State's Coast Office. A copy of the "Application for Expedited Determination of Public Trust Boundary" is on file with the Mississippi College Law Review.

survey of their land, if necessary, with the Office of the Secretary of State.¹¹⁷ The public trust boundary will be delineated based upon the Blue Ribbon Commission's recommendations, rather than the tidelands legislation.¹¹⁸ Both parties would be bound by the results.¹¹⁹

Meanwhile, on January 18, 1989, William D. Byrd filed suit in the Chancery Court of Harrison County, Mississippi, to confirm his title to ocean front property used as a car dealership.¹²⁰ Mr. Byrd's coastal property includes a small portion seaward of a seawall constructed by the Harrison County Board of Supervisors in 1953 to protect U.S. Highway 90,¹²¹ as well as an area landward of the seawall that was created by fill deposited by the county during construction.¹²² After passage of the tidelands legislation, Mr. Byrd learned that the Secretary of State intended to file suit in Hinds County, Mississippi, seeking to have the legislation ruled unconstitutional.¹²³ In an effort to have the action heard before a court of his choosing, Mr. Byrd amended his original complaint to include a request for declaratory judgment that the tidelands legislation be declared constitutional.¹²⁴

The suit filed in Hinds County was stayed pending resolution of the action in Harrison County.¹²⁵ Two banks, the State of Mississippi, the City of Biloxi, and Harrison County joined Mr. Byrd in asserting the constitutionality of the tidelands legislation.¹²⁶ The Secretary of State filed a counterclaim seeking declaratory relief with respect to the tidelands legislation.¹²⁷ Legal briefs in support of the constitutionality of the tidelands legislation were submitted by William D. Byrd¹²⁸ and the State of Mississippi.¹²⁹ The Mississippi Secretary of State submitted a brief challenging the legislation's constitutionality.¹³⁰ In addition, Karl Wiesenburg, a

117. Press Release from Office of the Mississippi Secretary of State, at 1 (May 23, 1989).

118. *See id.* at 3-4.

119. *See id.*

120. Byrd v. State, No. 17,879, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990). On appeal to the Mississippi Supreme Court (No. 90TS692).

121. Brief for Plaintiff, William D. Byrd, Byrd v. State, No. 17,879, at 2. On Appeal to the Mississippi Supreme Court (No. 90TS692) [hereinafter Byrd Brief].

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *See* Brief of Counter-Plaintiff, Secretary of State of Mississippi, Byrd v. State, No. 17,789 (Ch. Ct. of Harrison County, Miss.). On appeal to the Mississippi Supreme Court, (No. 90TS692) [hereinafter Secretary of State Brief].

128. *See* Byrd Brief.

129. *See* Brief of Defendant, State of Mississippi, Byrd v. State, No. 17,879 (Ch. Ct. of Harrison County, Miss.). On appeal to the Mississippi Supreme Court (No. 90TS692) [hereinafter State of Mississippi Brief].

130. Secretary of State Brief, *supra* note 127.

riparian owner of property in Jackson County, Mississippi, filed a late brief after being granted permission to join as counter-plaintiff with the Secretary of State.¹³¹

Argument on the declaratory judgment was heard on April 16, 1989, before Chancellor William L. Stewart, the same judge whose tideland opinion had been affirmed by the Mississippi Supreme Court in *Cinque Bambini*¹³² and the United States Supreme Court in *Phillips Petroleum Co.*¹³³ Chancellor Stewart ruled immediately following oral argument that the tidelands legislation is constitutional.¹³⁴

On April 25, 1990, shortly after the ruling by the chancery court, the Secretary of State published preliminary maps of public trust tidelands as directed by the tidelands legislation.¹³⁵ The maps depict both the historical tideland prior to development, and the 1973 line, which is essentially the current mean high water line.¹³⁶ A judicial stay has since been entered enjoining the Secretary of State from publishing final maps pending the Mississippi Supreme Court's determination of the tidelands legislation's constitutionality.¹³⁷

According to the preliminary maps, approximately 1500 acres of tidelands in Mississippi have been filled, in addition to the public sand beaches south of the seawalls.¹³⁸ Nearly 1350 acres have been filled by federal, state, or local government entities to serve as ports, small craft harbors, dredged material containment sites, or industrial parks.¹³⁹ Generally, these filled tideland areas will not be af-

131. Mr. Wiesenburg died suddenly in July, 1990. In addition to being a coastal landowner, Mr. Wiesenburg was an attorney and former member of the Mississippi State Legislature. During his career, Mr. Wiesenburg has served as legal counsel for the State Highway Commission, Jackson County, Mississippi, the Jackson County Port Authority, the Pascagoula Port Commission, and the City of Pascagoula. He authored several pieces of coastal legislation and was "involved for approximately forty years with questions as to the status of the public trust tidelands of the State of Mississippi." Motion of Karl Wiesenburg, a Riparian Landowner, to Join as a Counter-Plaintiff with the Secretary of State or, alternatively, to File an Amicus Curiae Brief in This Cause, *Byrd v. State*, No. 17,879 (Ch. Ct. of Harrison County, Miss.). On appeal to the Mississippi Supreme Court (No. 90TS692).

132. *Cinque Bambini Partnership v. State*, 491 So. 2d 508 (Miss. 1986).

133. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

134. *Byrd v. State*, No. 17,879, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990).

135. MISS. CODE ANN. § 29-15-7 (Supp. 1989). Much of the information in this section comes from a paper entitled "Resolving Title Claims to Filled Submerged Lands in Mississippi," which was presented by Margaret A. Bretz at the Western States Lands Commissioners Summer Conference, Duluth, Minnesota, July, 1990 [hereinafter Bretz]. See also Florida Eng'g Servs. Corp., Project Report, Identification of Public Trust Tidelands, Apr., 1990; and Mississippi Secretary of State, *Preliminary Map of Public Trust Tidelands*, Apr. 25, 1990 (These maps are available for inspection at the Secretary of State's office in both Jackson, Miss. and Gulfport, Miss.; in each of the chancery clerk's offices in the three Mississippi coastal counties; and in all public libraries in each of the three Mississippi coastal counties. Copies of the maps may be purchased from the Public Lands Division of the Secretary of State's office in Jackson, Miss.).

136. Bretz, *supra* note 135, at 6.

137. *Id.*

138. There are approximately 26 miles of publicly filled sand beaches below the seawall along Highway 90. There are additional sand beaches created or replenished below some of the other publicly constructed seawalls in Bay St. Louis, Waveland, Ocean Springs, and Pascagoula. These beaches are designated as part of the public trust tidelands in the Secretary of State's Preliminary Maps. However, because of the unsettled state of the law in Mississippi governing man-made sand beaches, and because very little, if any, construction has taken place directly on them, these beaches will not be included in this discussion of the extent and character of filled tidelands. See *supra* note 135.

139. Bretz, *supra* note 135, at 2-3. Public projects include 08.8 acres at the Port of Gulfport; 526.4 acres at Singing River Island; 436.5 acres at Ingalls Peninsula; 137.1 acres at Bayou Cassotte Industrial Park; 5.9 acres at Bayou Bernard Industrial Park; and 2.9 acres at Clay Point Industrial Park. *Id.* See also Florida Eng'g Servs. Corp., *supra* note 135.

fectured by the tidelands legislation because title to the property remains vested in the State of Mississippi. Moreover, the legislation exempts all public projects that serve a "higher public purpose" from any use or rental fees.¹⁴⁰

About ninety acres of the approximately 150 acres of privately-developed filled tidelands that remain were created in association with seafood processing plants.¹⁴¹ Beginning in the 1870's, tidelands were filled with oyster shells, and canning factories were constructed and expanded on top of them.¹⁴² Most of this property is located in Biloxi, although the cities of Waveland and Pass Christian also have some shell-filled tidelands.¹⁴³ Yacht clubs, restaurants, semi-trailer parking lots, condominiums, and other public and private enterprises have replaced seafood plants as the primary occupants.¹⁴⁴ The final sixty acres consist of approximately fifteen acres of filled tideland property in Hancock County, developed as residential subdivisions between 1940 and 1970; forty acres of tidelands located upland from two large recreational piers; eight acres of tidelands created by dredge spoil in connection with the construction of Popp's Ferry Bridge; and a few acres of fill that now support a natural wetland in an area south of the seawall.¹⁴⁵

Although relatively small in acreage, tideland areas filled prior to 1973 represent some of the most valuable coastal property in the state. The vast majority of this property was developed by public port commissions and other governmental entities pursuant to specific legislative authorization.¹⁴⁶ Port commissions are authorized to sublease the property for commercial development or other purposes for a period not exceeding forty years on "such terms and conditions, and with such safeguards, as will best promote and protect the public interest."¹⁴⁷ Nevertheless, title problems may arise when public bodies acquire for port, recreational, and other uses, lands originally filled by private persons for private purposes. At least one current instance exists in which a city is leasing space from a private yacht club for use as a free parking area for recreational and commercial users of the city's harbor.¹⁴⁸

Clearly, private owners of the remaining ten percent of the tidelands developed before 1973 will become the prime beneficiaries should the tidelands legislation be upheld on appeal. By awarding these coastal property owners fee simple title, the state foregoes all rental fees and allows the owners to retain all rights of alienation and use, subject only to certain statutory environmental and zoning restric-

140. "Higher public purpose" has been defined as "promoting the conservation, reclamation, preservation of the tidelands and submerged lands, public use for fishing, recreation or navigation, or the enhancement of public access to such lands." MISS. CODE ANN. § 29-15-13 (Supp. 1989).

141. Bretz, *supra* note 135, at 2.

142. *Id.* at 1-2.

143. *See id.* at 2.

144. *Id.* at 2.

145. *Id.* at 3.

146. MISS. CODE ANN. § 59-1-1 to -45 (1972 & Supp. 1990).

147. MISS. CODE ANN. § 59-1-17(3) (1972 & Supp. 1990).

148. Bretz, *supra* note 135, at 3.

tions.¹⁴⁹ Title insurance companies that have issued policies to coastal property owners and lending institutions that have used coastal property as security for loans will also receive significant benefits should the legislation be upheld.

While the largest and most exposed underwriter of title insurance has almost uniformly chosen not to insure Mississippi waterfront property during the past two years, a number of other insurance companies have issued policies based in part on case-by-case opinions from the Secretary of State concerning tidelands boundaries on individual parcels.¹⁵⁰ Similarly, the drying-up of bank financing for the purchase or expansion of homes and businesses has not materialized.

Unquestionably, the Legislature has a legitimate concern for the economic well-being of coastal property owners, lenders, and insurers. Much less clear, however, is whether the Legislature has the legal authority to favor the interests of this select group over the rights of other citizens who seek to protect and preserve the state's public trust tideland areas.

IV. SUMMARY OF THE LEGAL ARGUMENTS BEFORE THE CHANCERY COURT IN SUPPORT OF TIDELANDS LEGISLATION¹⁵¹

A. Purposes of the Public Trust Under State Law

Plaintiffs assert that the Legislature has both the power to determine the parameters of private and public ownership, as these parameters affect the public trust lands, and to develop the procedures for implementation of these parameters.¹⁵² Once Mississippi acquired its trust lands upon statehood, the only law applicable

149. Because the tidelands legislation excludes tidelands filled before 1973 from being considered part of the public trust, the Coastal Wetlands Protection Law, Miss. CODE ANN. § 49-27-1 to -69 (Supp. 1989), would not be applicable to the filled properties. The Act defines "coastal wetlands" as "all publicly owned lands subject to the ebb and flow of the tide[;] which are below the watermark of ordinary high tide[;] . . . and all publicly owned submerged water-bottoms below the watermark of ordinary high tide." Miss. CODE ANN. § 49-27-5(a) (Supp. 1989).

150. Bretz, *supra* note 135, at 4.

151. The following section summarizes the major legal arguments presented in each of the party's briefs to the Harrison County Chancery Court. It must be noted that the authors would prefer to take the more traditional approach of discussing and analyzing the written findings of the court; however, Judge Stewart's findings in *Byrd v. State*, No. 17,879, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990), provide very little material upon which to base such an analysis. By summarizing the principal arguments from the primary briefs, the authors hope to enable readers to better understand the legal analysis provided in later portions of the article. Space and organizational considerations prevent any mention of arguments from reply briefs. Readers may obtain copies of the legal briefs and judicial opinion by contacting the Clerk of Court, Harrison County Courthouse, 101 East Washington Street, P.O. Box 235, Biloxi, MS 39533.

152. *Byrd* Brief, *supra* note 121, at 18. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), *reh'g denied*, 486 U.S. 1018 (1988), was cited for the proposition that individual states have the authority to define the limits of the land held in public trust and to recognize private rights in such lands as they see fit. See *Byrd* Brief, *supra* note 121, at 18.

to Mississippi water bottoms became state law.¹⁵³ The plaintiffs claim that the State Legislature has exclusive authority to enact statutes that control property and define the rights of owners in relation to the state.¹⁵⁴ Citing previous Mississippi Supreme Court decisions, the plaintiffs argue that the Legislature has a duty to protect and administer public trust property.¹⁵⁵ According to the plaintiffs, *Treuting v. Bridge & Park Commission*¹⁵⁶ is of particular importance because the Mississippi Supreme Court upheld the right of the Legislature to authorize, by general legislation, sale of a portion of Deer Island and adjacent submerged lands to the Biloxi Park Commission for construction of a proposed forty-million dollar construction project.¹⁵⁷ The submerged land at issue was to be developed for use as a residential community.¹⁵⁸ Twenty-seven percent of the project was scheduled to be devoted to public uses, including golf courses, beaches, parks, green belts, schools, and other purposes; twenty percent would be allocated to street right-of-ways; the remaining fifty-three percent would be placed in private ownership.¹⁵⁹ The *Treuting* court specifically found that the overall purpose of the proposed development of Deer Island promoted a large number of public interests and uses, and that "incidental private ownership of parts of the development [was] not inconsistent with the public trust in the submerged lands."¹⁶⁰ Therefore, the plaintiffs assert that *Treuting* provides clear guidance concerning the purposes of the public

153. *Id.* at 22 (citing *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512 (Miss. 1986), *cert. granted*, 479 U.S. 1084 (1987), *aff'd sub. nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, *reh'g denied*, 486 U.S. 1018 (1988)). In support of their position, the plaintiffs quoted *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944)) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.'"). See Byrd Brief, *supra* note 121, at 22.

154. *Id.* at 22-23. It is also mentioned that the incongruous nature of state law is a result of the decisions of the Mississippi Supreme Court in *Morgan v. Reading*, 11 Miss. 366 (1844), *limited by*, *Commissioners of Homochitto River v. Withers*, 29 Miss. 21, 33-34 (1855), and *Steamboat Magnolia v. Marshall*, 39 Miss. 109 (1860), which permit private parties to own non-tidally affected navigable rivers. See Byrd Brief, *supra* note 121, at 23. It seems to defy logic that the same court could find the 1989 tidelands legislation unconstitutional when this legislation is merely trying to protect and preserve the remaining part of the trust by defining its limits. See *id.* at 24.

155. Byrd Brief, *supra* note 121, at 24-33, provides a chronological discussion of the development of the tidally affected trust as the trust evolved through judicial decisions of the Mississippi Supreme Court. Most of these cases are only peripherally related to the issue at hand and no point would be served by discussing each one. Those cited decisions that provide some support for the Legislature's role in defining the public trust include: *Henritzy v. Harrison County*, 178 So. 322 (Miss. 1938) (for the proposition that a vast amount of power is vested in the Legislature, and the court must give effect to the intention of the Legislature even though it may seem harsh to the court), Byrd Brief, *supra* note 121, at 27; *Crary v. State Highway Comm'n.*, 68 So. 2d 468 (Miss. 1953) (provides additional evidence of the Legislature's authority to harmonize public and private interests, which at first glance seem to be inconsistent) Byrd Brief, *supra* note 121, at 28; *Harrison County v. Guice*, 140 So. 2d 838 (Miss. 1962) (the State's ownership of the bottoms of tidally affected waters "is essentially ownership of the bottoms as bottoms"), Byrd Brief, *supra* note 121, at 29.

156. *Treuting v. Bridge & Park Comm'n of Biloxi*, 199 So. 2d 627 (Miss. 1967).

157. The proposed Deer Island development never took place.

158. Byrd Brief, *supra* note 121, at 31.

159. *Id.* See *Treuting*, 199 So. 2d at 631.

160. *Treuting*, 199 So. 2d at 634.

trust and the role of the trustee.¹⁶¹ The *Treuting* court recognized that Biloxi, Mississippi, was "in urgent need of physical space for expansion."¹⁶² The plaintiffs thus assert that denying the Legislature the right to alienate tidelands now would be inconsistent with the public trust, which the state is charged with administering.¹⁶³

B. No Donation Because Legislation Serves Higher Public Purpose

Plaintiffs claim further that legislation affecting public trust land does not amount to a donation in violation of section 95 of the Mississippi Constitution if it achieves a "higher public purpose."¹⁶⁴ In this instance, the higher public purpose to be served is resolving the discord which is causing extensive and intolerable harm to the public's enjoyment of the state's public trust lands.¹⁶⁵ The purposes and interests served by the tidelands legislation, therefore, provide beyond any doubt sufficient grounds to enforce and uphold the validity and constitutionality of the legislation.¹⁶⁶ For example, without the tidelands legislation, each of the thousands of water front properties would be treated separately and owners would be confronted with the time-consuming and expensive process of defending their

161. Byrd Brief, *supra* note 121, at 34-35, asserted that *Treuting* recognized at least five duties imposed on the State in carrying out its public trust responsibilities: (1) the State must use such property so as not to interfere with riparian rights of upland owners; (2) the State must recognize that there is a consequential private trust associated with these water bottoms in favor of the upland owners; (3) the State must not frustrate any attempt to put litteral (riparian) property to meaningful use, public or otherwise; (4) the State must recognize the totality of the development and not isolate one part of the development away from another part; and (5) the State must recognize and accommodate a city's need for physical space for expansion. *Id.*

162. Byrd Brief, *supra* note 121, at 34 (quoting *Treuting*, 199 So. 2d at 629).

163. Plaintiffs buttress their conclusion with *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) which held that the State, as absolute owner of the title to the soil and minerals in the beds of the shores, arms, and inlets of the sea, had "the consequent right to use or dispose of any portion thereof, when that can be done without impairment of the interest of the public in the waters" 184 Miss. at 230, 184 So. at 50.

164. Byrd Brief, *supra* note 121, at 3. See also *State of Mississippi Brief*, *supra* note 129, at 12 (citing *Treuting*, 199 So. 2d at 633).

165. Purposes expressly noted within the legislation include: (1) resolution of the uncertainty and disputes that have plagued the coastal counties for decades; (2) recognition of an allowance for economic growth and development as well as an increase in jobs for the community; (3) encouragement of the recreation and tourism while promoting the preservation of the natural state of the tidelands and their ecosystems; and (4) generation of funds to be used for the protection and regeneration of these areas. MISS. CODE ANN. §§ 29-15-1, -3, -9 (Supp. 1989).

166. In the view of William Byrd, in order for the Secretary of State to prevail on his theory of donation, the following must be clearly shown: (1) that the "rights of the public to the use of the public trust land and waters have been impaired;" (2) that the "purposes of the trust are diminished;" (3) that "there has been a donation not incidental to a higher public purpose;" (4) that there is "some diminution of the area available to the public;" (5) that there is "some interference with the chief public purposes of the trust—commerce, navigation, and fisheries;" (6) that the "totality of the things sought to be accomplished by the Legislature does not promote the public trust;" (7) that the "Legislative exercise of public policy is totally inconsistent with the public trust which the State is charged with administering;" and (8) after a showing of all of the above, that the "strong presumption of constitutionality has been clearly overcome—that the [Legislation] is clearly, and beyond a reasonable doubt, unconstitutional" (Byrd Brief, *supra* note 121, at 36-37). None of the above requirements can be met according to Byrd. No legal authority was provided in support of the listed criteria. *Id.*

claims.¹⁶⁷ In addition, because the Legislature has wide latitude to make legislative declarations and findings of fact,¹⁶⁸ such as those in the tidelands legislation, and all legislative enactments are presumed to be constitutional,¹⁶⁹ they conclude the statute should be upheld.¹⁷⁰

C. Secretary of State Has Authority to Determine the Public Trust Boundary Based Upon the Common Law

Plaintiffs' second section 95 argument postulates that no donation has taken place because the Secretary of State has discretion to revise the boundary in accordance with the common law.¹⁷¹ They claim that the tidelands legislation fully recognizes that the established body of common law pertaining to the tidelands should be observed in interpreting the statute and in establishing the public trust boundary.¹⁷² The Secretary of State is directed to allow a sixty-day period after publication of the preliminary map to receive comments, documentation, and other information, which he is to use "at his discretion" to compile a final tidelands map.¹⁷³ Plaintiffs assert that comments from all possible interests, including the Secretary of State's own office, may be submitted during this comment period. After the sixty days, the Secretary of State may make revisions "at his discretion,"¹⁷⁴ and he also has the last word in determining where the boundary will be located in accordance with the common law.¹⁷⁵

D. The Legislation Is Not Severable

Their final assertion relates to the lack of a severability clause in the tidelands legislation.¹⁷⁶ They view the legislation as a comprehensive procedure which may not be divided without defeating its purpose and intent.¹⁷⁷ Because the twelve parts of the legislation are interrelated, they must act in concert.¹⁷⁸ Therefore they

167. Byrd Brief, *supra* note 121, at 37-38. Moreover, they argue that the Secretary of State's classification of the legislation as a donation ignores the following statement in *Guice*: "The state's ownership of the bottoms of the submerged land is essentially ownership of the bottoms as bottoms." *Id.* at 38 (quoting *Guice*, 140 So. 2d at 842). They reason that a careful reading of Mississippi cases indicates that the higher public purposes all have to do with enjoyment of submerged lands under tidal waters, while the only land affected by the tidelands legislation is filled property. Therefore, state ownership of submerged property remains unchanged. *Id.*

168. *Id.* at 12.

169. *Id.* at 15.

170. *Id.* at 51.

171. State of Mississippi Brief, *supra* note 129, at 9.

172. *Id.* at 8 (citing Miss. CODE ANN. § 29-15-7(2) (Supp. 1989)).

173. *Id.* at 9 (citing Miss. CODE ANN. § 29-15-7(4) (Supp. 1989)).

174. *Id.*

175. *Id.*

176. *Id.* at 15.

177. *Id.*

178. *Id.* (citing *Brady v. John Hancock Mut. Life Ins. Co.*, 342 So. 2d 295 (Miss. 1977)).

conclude that any separation based upon a ruling of unconstitutionality would cause the entire legislation to fail.¹⁷⁹

E. Disastrous Consequences of Ruling of Unconstitutionality

To lend support to their legal arguments, plaintiffs predict that a finding of unconstitutionality would disturb thousands, if not tens of thousands, of titles on the Mississippi Gulf Coast and along tidally affected estuaries and rivers.¹⁸⁰ As a result, the state and its citizens would be needlessly subjected to expensive and time-consuming litigation and would have to cope with the adverse economic effects described in the preamble to the tidelands legislation.¹⁸¹ The Mississippi courts have recognized the importance of honoring reasonable expectations in property interests.¹⁸² Only the Legislature has the duty, authority, and mechanisms to find solutions to great public issues such as the one presented here.¹⁸³ Therefore, the legislation should be upheld.

V. SUMMARY OF LEGAL ARGUMENTS TO THE CHANCERY COURT IN OPPOSITION TO TIDELANDS LEGISLATION

A. The Legislation Constitutes a Conveyance of Trust Properties to Private Persons in Violation of the Public Trust Doctrine

The Secretary of State disputes the assertion in the tidelands legislation's preamble that "a dispute has developed . . . calling into question titles and legal issues believed secure and determined from the date of statehood."¹⁸⁴ To the contrary, he argues that this statement conflicts with previous determinations of

179. *Id.* In support of this conclusion, the State quoted *Quinn v. Branning*, 404 So. 2d 1018 (Miss. 1981), which declared:

"[I]t is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect, it would not have enacted the residue independently."

State of Mississippi Brief, *supra* note 129, at 9 (quoting *Quinn*, 404 So. 2d at 1020). See also *Lovorn v. Hathorn*, 365 So. 2d 947, 950 (Miss. 1979); *Wilson v. Jones County Bd. of Supervisors*, 342 So. 2d 1293, 1296 (Miss. 1977); *Howell v. State*, 300 So. 2d 774, 781 (Miss. 1974).

180. Byrd Brief, *supra* note 121, at 41.

181. *Id.*

182. *Id.* at 42. The court quoted *Moore v. Kuljis*, 207 So. 2d 604 (Miss. 1967), which stated:

"The Chancery Court held that the subject land was susceptible of private ownership, under the two *Skrmetta* cases and the *Guice* case. *Harrison County v. Guice*, 244 Miss. 95, 140 So. 2d 838 (1962); *Skrmetta v. Moore*, 227 Miss. 119, 86 So. 2d 46 (1956); *Skrmetta v. Moore*, 202 Miss. 585, 30 So. 2d 53 (1947). It further observed that to rule otherwise would have disastrous consequences by disturbing innumerable titles on the coast, many of which have been developed and occupied over a period of many years at great costs."

Byrd Brief, *supra* note 121, at 42 (quoting *Moore*, 207 So. 2d at 614) (emphasis added).

183. *Id.* at 42-43.

184. Section 1 of 1989 Miss. LAWS ch. 495, (Preamble to Tidelands Legislation).

the Mississippi Supreme Court in *Cinque Bambini*,¹⁸⁵ and the United States Supreme Court in *Phillips Petroleum Co.*,¹⁸⁶ which affirmed Mississippi's ownership by law of public trust lands from the time of statehood.¹⁸⁷

Furthermore, he asserts that Mississippi case law clearly provides that neither the state nor the federal government can validly convey title in fee simple to land under tidewater to private owners for private purposes.¹⁸⁸ The tidelands legislation is an attempt to do, through legislation, precisely what has been rejected by the courts.¹⁸⁹ He claims that if the Legislature has sought "to confirm the mean high water boundary line as determined by the Mississippi Supreme Court, the laws of this state and this chapter,"¹⁹⁰ then the provision directing that the boundary in developed areas be established at the mean high water line nearest the effective date of the Coastal Wetlands Protection Act must be declared invalid.¹⁹¹

*B. Public Trust Tidelands Cannot Lawfully Be
Conveyed to Private Persons for Private Purposes*

The Secretary of State reads Mississippi case law relating to alienation of public trust land differently from the plaintiffs. He cites the 1928 Mississippi Supreme Court decision in *Money v. Wood*¹⁹² which unreservedly recognized that "the state, as trustee, has no right or power to dispose of such [public trust] lands in any manner or extent inconsistent with the purpose for which the trust exists."¹⁹³ The opinion further proclaims that "the state cannot convey in fee such rights to private owners for private purposes."¹⁹⁴ The Secretary of State then traces *Money's* progeny which he claims hold that state public trust tidelands cannot lawfully be con-

185. Secretary of State Brief, *supra* note 127, at 7. The Secretary of State quoted *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (Miss. 1986), which stated: "Our cases suggest that, once held by the State in trust, properties are committed to the public purpose and may be alienated from the State only upon the authority of legislative enactment and then only consistent with the public purposes of the trust." Secretary of State Brief, *supra* note 127, at 7 (quoting *Cinque Bambini*, 491 So. 2d at 519).

186. *Id.* at 7. The court noted that the State's claim to tidelands along the shore has been clear, unequivocal, and consistently held from the time of statehood. *PHILLIPS PETROLEUM CO.*, 484 U.S. at 482.

187. Secretary of State Brief, *supra* note 127, at 7.

188. *Id.* at 8 (citing *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 291 (1933) and *International Paper Co. v. Mississippi State Highway Dep't*, 271 So. 2d 395 (Miss. 1973)).

189. *Id.* Also see *Wiesenburg Brief*, *infra* note 202, at 8, where it is pointed out that the argument that coastal property owners were ignorant of the fact that they could not acquire title to artificially dredged tidelands is negated by two letters addressed to the State Land Commissioner from the Mississippi Attorney General's office dated July 20, 1954 and September 7, 1954, respectively. These letters, attached as Exhibits "C" and "D" to the *Wiesenburg Brief*, reflected the opinion of the Attorney General that the State Legislature has no authority to authorize private persons to acquire any interest in public trust tidelands.

190. MISS. CODE ANN. § 29-15-3 (Supp. 1989).

191. Secretary of State Brief, *supra* note 127, at 8-9.

192. 118 So. 357 (Miss. 1928).

193. Secretary of State Brief, *supra* note 127, at 9-10 (quoting *Money v. Wood*, 118 So. 357, 359 (Miss. 1928)). The Secretary of State pointed out that "Money intended to develop tidewater lands in the Mississippi Sound 'by dredging, filling, and raising' the submerged land and constructing a hotel and convention hall upon it." *Id.* (quoting *Money*, 118 So. at 358).

194. *Money*, 118 So. at 359.

veyed to private persons for private use.¹⁹⁵ The Secretary of State thus concludes that since the Mississippi Supreme Court proclaimed in 1857 that "the shores of the sea below high water mark belong to the State as trustee for the public," the courts have carefully and painstakingly, with few departures, defined and protected this great trust of the people of Mississippi.¹⁹⁶ The tidelands legislation, however, relegates the tidelands trust to the political arena, where all persons are not of equal standing.¹⁹⁷ It creates a special class of persons, those who encroached onto trust tidelands prior to 1973, and rewards them with ownership of lands that are not subject to private ownership.¹⁹⁸ He asserts that determinations regarding the trust should not be made because of political considerations, but should continue to be made through the non-political deliberations and decisions of the courts.¹⁹⁹

C. The Law Conflicts with the Mississippi and United States Constitutions

1. No Donation of Public Property to Private Parties

The Secretary of State further argues that section 95 of article 4 of the Mississippi Constitution of 1890 explicitly prohibits the donation of public lands either directly or indirectly to private corporations or individuals.²⁰⁰ Therefore, the tidelands legislation's validation of all encroachments on the public trust tidelands prior to July 1973, which results in vesting title to persons who either ignorantly or knowingly were guilty of such encroachment, amounts to an uncompensated grant of title to public property in violation of section 95.²⁰¹

195. Secretary of State Brief, *supra* note 127, at 9-11. The Secretary of State quoted *Rouse v. Saucier's Heirs*, 146 So. 291 (Miss. 1933), which stated: "[N]either the state nor the federal government can validly convey title in fee simple to [tidelands] . . . to private owners for private purposes." Secretary of State Brief, *supra* note 127, at 9-11 (quoting *Rouse*, 146 So. at 292). The Secretary of State also cited *State ex rel. Rice v. Stewart*, 184 So. 44 (Miss. 1938) (The state, as trustee, was entitled to recover the value of sand and gravel dredged from the bed of tidal area, implicitly reiterating the prohibition against converting public trust property to private use.). Secretary of State Brief, *supra* note 127, at 10 (citing *Stewart*, 184 So. 44). Finally, the Secretary of State cited *Crary v. State Highway Comm'n*, 68 So. 2d 468 (Miss. 1954) (In both cases, the court unequivocally held that tidelands are owned by the State as trustee for its people, and that the rights of riparian owners are mere revocable privileges or licenses subject to the superior right of the State to impose an overriding public use upon the tidelands.). Secretary of State Brief, *supra* note 127, at 11 (citing *Crary*, 68 So. 2d 468).

196. Secretary of State Brief, *supra* note 127, at 14 (quoting *Martin v. O'Brien*, 34 Miss. 21, 36 (Miss. 1857)).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 5 (citing *State v. Southern Pine Co.*, 205 Miss. 80, 38 So. 2d 442 (1949)) (holding that a "donation" is: the act or contract by which a person voluntarily transfers the title to a thing of which he is the owner, from himself to another, without any consideration, as a free gift). The brief cites *Tally v. Board of Supervisors*, 353 So. 2d 774 (Miss. 1978); *Bragg v. Carter*, 367 So. 2d 165 (Miss. 1978); *Keys v. Carter*, 318 So. 2d 862 (Miss. 1975); and *Holmes v. Jones*, 318 So. 2d 865 (Miss. 1975), as decisions that have ruled that where there is gross inadequacy of consideration, a conveyance amounts to an unconstitutional donation of public property in violation of section 95 of the Mississippi Constitution.

201. Secretary of State Brief, *supra* note 127, at 6 (citing *Wilmot Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184 (1954)). See also *infra* note 202, at 4-5.

2. Tidelands Legislation Violates Due Process

Intervenor Wiesenburg raises a due process issue.²⁰² He contends that the citizens of the State of Mississippi cannot be deprived of their rights to public trust tidelands by an act of the Legislature under section 14 of article 1 of the Mississippi Constitution.²⁰³ Such legislation also violates their right to due process of law under the fifth and fourteenth amendments to the Constitution of the United States, and of their right to equal protection under the fourteenth amendment.²⁰⁴ Moreover, he asserts that the Legislature cannot destroy the vested rights of the people,²⁰⁵ nor can it diminish the obligations or liabilities of those persons who either ignorantly or knowingly appropriated public trust tidelands for their own use prior to July 1, 1973.²⁰⁶

D. The Legislation Constitutes a Conveyance in Violation of the State's Fiduciary Duty as Trustee

The Secretary of State argues further that common law rules enforceable in the case of private trusts are applicable to lands held in public trust.²⁰⁷ According to the Mississippi Supreme Court, the State, like other trustees, must exercise a higher degree of care in administration of the trust than in the management of its individual personal business; basically it needs more care than is needed in attending to state business.²⁰⁸ The essence of a trust is the relationship of the trustee

202. Brief of Karl Wiesenburg, A Citizen, Taxpayer and Riparian Landowner, In Support of the Brief of the Secretary of State of the State of Mississippi, Counter-Plaintiff in the Above Styled Case, Byrd v. State, No. 17,879. On appeal to the Mississippi Supreme Court (No. 90TS692) [hereinafter Wiesenburg Brief].

203. *Id.* at 3. Section 14 of article 1 of the Mississippi Constitution provides: "No person shall be deprived of life, liberty, or property except by due process of law." Miss. CONST. art. 1, § 14.

204. Wiesenburg Brief, *supra* note 202, at 6.

205. *Id.* Section 16 of article 3 of the Mississippi Constitution provides: "Ex post facto laws, or laws impairing the obligation of contract, shall not be passed." Miss. CONST. art. 3, § 16. Tidelands are held by the state, not as sole proprietor, but in trust for the people of the state. Any attempt by the legislature to destroy the vested right of the people or the state in the public trust tidelands without their consent runs afoul of the most basic tenets of the constitutional law. Wiesenburg Brief, *supra* note 202, at 3-4 (citing *Veillion v. Knapp & East*, 171 Miss. 608, 158 So. 2d 336 (Miss. 1963)). Wiesenburg also quoted *Commercial Bank v. Chambers*, 8 S. & M 56, 57 (1847) in which the Mississippi Supreme Court stated:

'It requires no argument to prove that the legislature cannot interfere with vested rights in such a way as to destroy them. Remedies may be provided in aid of them, but any legislative act which destroys a right, or transfers it from one to another, against the will of the owner, is void. The fundamental principles of government forbid it. It is beyond the legitimate power of the legislature. A retrospective statute, affecting and changing vested rights, is very generally considered in this country, says Chancellor Kent, as founded on unconstitutional principles, and consequently inoperative and void . . .'

Wiesenburg Brief, *supra* note 202, at 3-4 (quoting *Commercial Bank*, 8 S. & M. at 57).

206. Wiesenburg Brief, *supra* note 202, at 5. Section 100 of article 4 of the Mississippi Constitution provides: No obligation or liability of any person, association, or corporation held or owned by this state, or levee board, or any county, city, or town thereof, shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; but this shall not be construed to prevent the legislature from providing by general law for the compromise of doubtful claims.

Miss. CONST. art. 4, § 100.

He claims also that public port agencies have paramount rights over the use of public trust tidelands for port and industrial purposes as against any private claim of ownership. Wiesenburg Brief, *supra* note 202, at 6-7.

207. Secretary of State Brief, *supra* note 127, at 15.

208. *Id.* (citing *Humble Oil & Refg v. State*, 206 Miss. 847, 41 So. 2d 26 (1949)).

to the beneficiary and the obligation of the trustee to act only in the interest of the beneficiary.²⁰⁹ In a trust relationship a trustee cannot sacrifice or place second the interest of the beneficiary to some real or imagined other interest. Similarly, then, under Mississippi law, "tidelands held in trust for all the people of Mississippi may not be conveyed to private individuals for private use."²¹⁰

E. Those Portions of the 1989 Tidelands Legislation That Are in Conflict with the Constitution Must Be Declared Void

The Secretary of State asserts the general proposition that, if possible, a statute must be given such a construction that its parts harmonize with each other and are rendered consistent.²¹¹ He recognizes as well settled, that an unjust or unwise purpose will not be imputed to the Legislature when any other reasonable construction can save it from such imputation.²¹²

On the other hand, he claims one of the fundamental principles of our system of government is that all branches of government are subject to and bound by the terms of the Constitution, and that legislative enactments contrary to the Constitution are void.²¹³ Therefore, title to trust lands cannot be confirmed in private individuals, even pursuant to statute, where they have been donated in violation of section 95 of the Mississippi State Constitution. As a result, the last phrase in section 29-15-7(1)²¹⁴ which calls on the public trust tideland boundary to be determined nearest the effective date of the Coastal Wetlands Protection Act unquestionably must be declared unconstitutional.²¹⁵

Although that portion of the 1989 legislation which is unconstitutional must be stricken, he asserts the legislation need not be struck in its entirety²¹⁶ because un-

209. *Id.* at 15-16 (citing BOGERT, TRUSTS AND TRUSTEES § 1 (2d ed. 1977) at 1-2; and SCOTT, SCOTT ON TRUSTS § 2.4 (4th ed. 1987)).

210. *Id.* at 16. The Secretary of State quoted *State ex rel. Coleman v. Dear*, 212 Miss. 620, 55 So. 2d 370 (1951), which stated:

"The State cannot abdicate its duty as trustee of property in which the whole people are interested, such as sixteenth section land held by the State as trustee for schools, any more than the State can surrender its police power in the administration of government and in the preservation of peace and order."

Secretary of State Brief, *supra* note 127, at 16 (quoting *Coleman*, 55 So. 2d at 373).

211. Secretary of State Brief, *supra* note 127, at 17 (citing *Coker v. Wilkinson*, 141 Miss. 604, 106 So. 886 (1926)).

212. *Id.* (citing *Gambrill v. Gulf States Creosoting Co.*, 216 Miss. 505, 62 So. 2d 772 (1953) and *Aikerson v. State*, 274 So. 2d 124 (Miss. 1973)).

213. *Id.* (citing *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 1803; *State v. Wood*, 187 So. 2d 820 (Miss. 1966); and *Saxon v. Harvey*, 223 So. 2d 620, 624 (Miss. 1969)). The Secretary of State quoted *Saxon*, which stated:

"While the legislature generally has the power to enact any law it sees fit, nevertheless, it is restricted in its enactment of laws by the provisions of our State Constitution and cannot by statutory enactment alter or nullify a clear, unambiguous mandate of the Constitution. Such a statute would be unconstitutional . . .

. . . If there exists an irreconcilable conflict . . . then the constitutional provisions must prevail."

Secretary of State Brief, *supra* note 127, at 17 (quoting *Saxon*, 223 So. 2d at 624).

214. Miss. CODE § 29-15-7(1) (Supp. 1989).

215. Secretary of State Brief, *supra* note 127, at 18.

216. *Id.* (citing *Wilson v. Jones County Bd. of Supervisors*, 342 So. 2d 1293 (Miss. 1977)). Interestingly, the language quoted is identical to that which was quoted in William Byrd's Brief, *see supra* note 121 and accompanying text. Of course, the parties interpreted the same language quite differently.

certainty with respect to legislative intent does not require the entire legislation to be stricken.²¹⁷ Clearly, the tidelands legislation was intended to outline a management program for all the public trust tidelands and should not be permitted to convey or donate those tidelands developed prior to 1973.²¹⁸

He argues further that the absence of a severability clause does not prohibit separation of the constitutional from the unconstitutional portions.²¹⁹ Moreover, mere uncertainty about legislative intent with respect to whether the statute would have been passed without the unconstitutional portion is not sufficient to determine that provisions may not be severed.²²⁰ He notes also that the interpretation or construction of a statute by the agency responsible for its implementation should be afforded great deference.²²¹ Thus, with the exception of the provision donating tidelands developed prior to 1973 and the declaration of the higher public purpose that such donation would serve, the procedures incorporated in the tidelands legislation are those that were recommended by the Secretary of State's Office.²²² The recommendations were the result of months of work by a tidelands commission appointed by the Secretary of State and incorporate the knowledge and expertise of that agency with respect to the public trust lands and the management thereof.²²³

VI. OPINION OF THE CHANCERY COURT

In a surprisingly brief opinion, the Chancellor found the tidelands legislation to be constitutional.²²⁴ After chastising white settlers for shamelessly displacing Native Americans and then, in the spirit of Easter time, forgiving them,²²⁵ the court categorized the legislation as valid regulation of property.²²⁶ Fiscal efficiency and administrative convenience impressed the court as sufficient reasons to "compromise . . . the purity of the *Cinque Bambini* boundary definition."²²⁷ The court noted that the law would result in the enrichment of some individuals at the expense of others; however, the court believed that *Treuting*²²⁸ allows such a result

217. Secretary of State Brief, *supra* note 127, at 18 (citing EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984)). See also Aikerson v. State, 274 So. 2d 124 (Miss. 1973) (if there is ambiguity within a statute its title may be considered in determining legislative intent).

218. Secretary of State Brief, *supra* note 127, at 19.

219. *Id.* (citing EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984)).

220. *Id.* (citing EEOC v. Hernando Bank, Inc., 724 F.2d 1188 (5th Cir. 1984)).

221. Secretary of State Brief, *supra* note 127, at 19-20 (citing L.H. Conard Furniture v. Mississippi State Tax Comm'n, 160 Miss. 185, 133 So. 652 (1931) and Grant's Center Hosp. of Mississippi v. Health Group of Jackson, Mississippi, 528 So. 2d 804, 810 (Miss. 1988) (the agency that works with a particular body of law "necessarily develops a level of insight and expertise likely beyond our ken. When such agencies speak, courts listen.")).

222. Secretary of State Brief, *supra* note 127, at 20.

223. *Id.*

224. Byrd v. State, No. 17,879, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990).

225. The opinion was rendered on April 18, 1990, three days after Easter Sunday. Byrd v. Mississippi, No. 17,789, slip op. (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990).

226. *Id.* at 9-10.

227. *Id.* at 9.

228. 199 So. 2d 627 (Miss. 1967). The court cited Moore v. Kuljis, 207 So. 2d 604 (Miss. 1967), as further support. Byrd v. Mississippi, No. 17,789, slip op. at 10 (Ch. Ct. of Harrison County, Miss. Apr. 18, 1990).

when it is incidental to the government's acting in the public interest.²²⁹ Furthermore, reasoned the court, the statute permits the Secretary of State, in his discretion, to revise the preliminary map when he determines the final boundary.²³⁰

VII. ANALYSIS

A. Constitutional Issue

Unfortunately, the Chancellor's opinion fails to adequately address the important issues raised by the 1989 tidelands legislation. Its failure to squarely face the critical section 95 constitutional conflict creates a fatal flaw in the opinion, justifying its overruling by the Mississippi Supreme Court. The language of section 95 is clear: The state can never donate directly or indirectly, public lands, including tidelands, to private interests.²³¹ The word "never" admits to no exceptions, and case law under section 95 encompasses none. In its most recent opinion construing section 95, the Mississippi Supreme Court held that leasing of sixteenth section trust property²³² at a "grossly inadequate price" violates section 95.²³³ In that case, the court voided a ninety-nine year lease of sixteenth section lands for a one-time payment of \$7.50 for a ninety-nine year term (an amount equal to .375% of its leased value).²³⁴ The Legislature's directive in the tidelands legislation is even more egregious—certain coastal landowners will in effect be receiving a gratuitous gift of trust land from the state.²³⁵

In a case dealing specifically with public trust tidelands, the Fifth Circuit Court of Appeals ruled similarly.²³⁶ Although the federal court's interpretation of Mississippi's Constitution is not binding on Mississippi courts, its analysis is sound and consistent with section 95 case law in Mississippi. In *United States v. Harrison County*,²³⁷ the federal appellate court found that section 95 prohibits private upland owners from gaining title to artificially filled trust tidelands, even when filled by a stranger to the upland title.²³⁸ At issue in *Harrison County* was ownership of public trust tide bottoms filled by the county in order to protect Highway 90 and the

229. *Id.* at 9-10.

230. *Id.* at 11.

231. Miss. CONST. art. 4, § 95.

232. Sixteenth section trust property is property held by the state for the benefit of public education. Miss. CODE ANN. § 29-3-1 (Supp. 1989); *Hill v. Thompson*, 564 So. 2d 1 (Miss. 1989).

233. *Hill v. Thompson*, 564 So. 2d 1 (Miss. 1989).

234. *Id.* at *28. The state sought return of full title to the State of Mississippi. For equitable considerations, the court refused to do so; rather it remanded the issue to the Forest Municipal Separate School board to redetermine the land's rental value. During the appraisal process, the current lessor retained the right to use the premises, as well as right of first refusal on the new lease and the right to meet the best bid. *Id.* at *35.

235. The authors recognize that the Supreme Court specifically excluded the 1989 tidelands legislation from the purview of its *Hill v. Thompson* opinion. However, that statement was made in the context of a review of legislation relating to the leasing procedures of public lands. Additionally, because the tidelands legislation was not at issue before them, there would have been no reason for them to issue an advisory opinion on applicability of section 95.

236. *United States v. Harrison County*, 399 F.2d 485 (5th Cir. 1968).

237. *Id.*

238. *Id.* at 491.

seawall separating it from the Mississippi Sound.²³⁹ The suit was brought by the United States for specific performance of a contract which "assured perpetual use of the beach."²⁴⁰ Support for ejecting the public from the beaches came from a previous Mississippi Supreme Court decision, *Harrison County v. Guice*,²⁴¹ awarding upland owners title to trust lands that Harrison County, using federal funds, had filled by artificial means.²⁴² The Fifth Circuit specifically refused to follow the *Guice* holding; it asserted that lack of reference to section 95 by the court invalidated the *Guice* opinion as binding precedent.²⁴³

Similarly, provisions of the tidelands legislation directing the Secretary of State to draw the boundary line inconsistent with the *Cinque Bambini* and *Phillips Petroleum Co.* decisions would unconstitutionally grant private persons title to public trust tidelands. As stated earlier, these cases establish Mississippi's boundary between public and private property in tidal areas as the mean high water mark when the state entered the Union in 1817.²⁴⁴ Changes in that boundary after 1817 must be consistent with state constitutional, statutory, and common law.²⁴⁵ As recognized by the Fifth Circuit in *Harrison County*, section 95 is an unambiguous blanket prohibition against changing that boundary when doing so results in the donation, either directly or indirectly, of public trust land to private parties.²⁴⁶ Therefore, a map or deed depicting boundaries where developments and encroachments prior to July 1, 1973, have altered the high water mark to the benefit of the private owner would be void.²⁴⁷ Any legislation directing the Secretary of State to do so is unconstitutional.

The Chancellor's ruling that the Secretary of State can amend the boundary consistent with the common law fails to remedy the constitutional deficiency. First, the Legislature cannot pass an unconstitutional law and cure it by inserting a section that gives the executive branch discretion to comply with or ignore the constitution.²⁴⁸ As stated by the Mississippi Supreme Court in *State ex rel. Kyle v. Dear*:²⁴⁹ "The Constitution is paramount to any authority conferred by a statute

239. *Id.* at 490.

240. *Id.* at 486, 490.

241. 244 Miss. 95, 140 So. 2d 838 (1962).

242. 399 F.2d at 490.

243. *Id.* at 491.

244. See *supra* notes 4-7 and accompanying text.

245. *Cinque Bambini*, 491 So. 2d at 512-13; *Phillips Petroleum Co.*, 484 U.S. at 475.

246. 399 F.2d at 491.

247. See *supra* notes 116-40 for a discussion of tidelands development on the Mississippi coast.

248. In *Hill v. Thompson*, 564 So. 2d 1 (Miss. 1989), the Mississippi Supreme Court rejected the Chancery Court's finding that the school district had followed existing statutory leasing procedures when it decided the lease value stating:

He [the superintendent of education] certainly has no authority to enter a long term lease at a nominal one time rental, so that the lease is tantamount to a gift. This principle has been embodied in this state's constitution which prohibits donation of public land no matter what legislative procedure is mandated. Miss. CONST. Art. 4, § 95 (1890). This Court knows of no rule of law whereby the substantive prohibition of Section 95 may be violated if only certain forms or procedures are met.

Id. at 9.

249. 209 Miss. 268, 46 So. 2d 100 (1950).

when the action taken under the statute is in conflict with the Constitution."²⁵⁰ In addition, to assert the contrary ignores the fact that legislative and administrative fiat are insufficient to amend Mississippi's Constitution. Amendment of a constitutional provision must be consistent with article 15, section 273 of the Mississippi Constitution, which details a procedure that was not followed when the Legislature passed the tidelands legislation.²⁵¹ It requires that two-thirds of the members of each house vote in favor of the amendment, followed by public notice and public election in which a majority of qualified electors voting must approve the amendment.²⁵² In fact, concurrent efforts to amend the constitution to ameliorate the effect of section 95 on the tidelands legislation failed.²⁵³

Second, as correctly stated by the court in *Harrison County*, section 95 supersedes the common law.²⁵⁴ The Mississippi Supreme Court has recognized this same principle in regard to sixteenth section trust lands.²⁵⁵ Followed to its logical extreme, this proposition prevents the Mississippi courts from applying common law public trust principles to the extent they result in a donation to private parties. In addition, it invalidates the language of section 29-15-7(2)²⁵⁶ that statutorily adopts the common law doctrines of accretion and reliction.²⁵⁷ For example, natural accretions that develop adjacent to the shore inure to the upland owner. To the extent that such accretions result in the diminution of public trust lands, it can be argued that an unconstitutional "donation" occurs.

Third, the tidelands legislation does not, as the court suggests, grant the Secretary of State that power. Section 29-15-7(4) of the Mississippi Code states: "The Secretary of State shall allow sixty (60) days after publication of the preliminary map for submission of comments and/or additional documentation and may, at his discretion, revise the map *accordingly*."²⁵⁸ Well-accepted standards of statutory construction require that words be given their plain meaning; use of the word "accordingly"²⁵⁹ limits the Secretary of State's discretion in adjusting the boundary to ways that correspond with public comment and documentation, but not to his own

250. *Id.* at 104.

251. MISS. CONST. art. 15, § 273.

252. *Id.*

253. S. CON. RES. 521, 104th Leg., Reg. Sess. (1989); S. 2770, 104th Leg., Reg. Sess. (1989).

254. 399 F.2d at 491. "In any event, the constitutional provision [section 95] supersedes and abrogates the common law." *Id.* (citation omitted).

255. "At common law no trustee has authority to lease real property held in trust for substantially less than the fair value thereof This principle has been embodied in this state's constitution which prohibits donation of public land" *Hill v. Thompson*, 564 So. 2d 1, 9 (Miss. 1989).

256. MISS. CODE § 29-15-7(2) (Supp. 1989).

257. *See id.*

258. MISS. CODE ANN. § 29-15-7 (Supp. 1989) (emphasis added).

259. Webster's Ninth New Collegiate Dictionary defines "accordingly" to mean in accordance with (in agreement with), correspondingly. WEBSTER'S NEW COLLEGIATE DICTIONARY 50 (9th ed. 1988).

initiative. The court's partial quote of section 29-25-7(4) omits the language that results in the conclusion that the Secretary of State's discretion is limited.²⁶⁰

Likewise, the court's attempt to avoid the plain language of section 95 by categorizing the legislation as regulation rather than a donation²⁶¹ is unpersuasive. Regulation of the type found in section 29-15-7 of the tidelands legislation clearly results in the gratuitous transfer of property from the public to private parties. The Chancellor in effect admits this when he states that "a few may improvidently benefit from the 1989 Tidelands Act."²⁶² The "benefit" he refers to is the private appropriation of public lands with no economic return to the public,²⁶³ i.e., a donation. However, he attempts to circumvent this conclusion by finding that the overall effect of the legislation is a "long delayed delineation between public and private interests"²⁶⁴ rather than a donation of public property to private interests.²⁶⁵ Such a change in characterization of the legislation fails to overcome the underlying result of the legislation — a free grant of public property to private interests in contravention of section 95 of the constitution.

Even if the tidelands legislation could be conceived as regulation rather than a donation, it must still fail because it divests the public of property without due process of law.²⁶⁶ Sections 95 and 273 of Mississippi's Constitution read together lead inevitably to this conclusion. Section 95 serves to constitutionally vest the public's interest in the state's publicly-owned property, including tidelands.²⁶⁷ The fifth amendment²⁶⁸ of the United States Constitution and section 14 of the Mississippi Constitution²⁶⁹ prevent the State of Mississippi from depriving its citizens of this property without due process of law. Because the source of the public's right is the state constitution, the only process that can lawfully take away this right is constitutional amendment. And as discussed earlier,²⁷⁰ the State Legislature failed to follow section 273's mandates when it passed the 1989 Tidelands Legislation. Therefore, absent a duly passed constitutional amendment modifying or repealing section 95, the Legislature is without authority to demand the Secretary of

260. *Byrd v. State*, No. 17,789, slip op. at 11 (Ch. Ct. of Harrison County, Mississippi Apr. 18, 1990). Defendant State of Mississippi's reasoning on p.9 of its brief that the Secretary of State's office can comment during the public comment period and then amend the map in accordance with its own comments is an absurd reading of Miss. CODE § 29-15-7. It is not common practice for agencies to comment on their own rules. Similarly, it is unlikely the legislature expected the Secretary of State to do so without explicitly stating so.

261. *Id.* at 5.

262. *Id.* at 9.

263. *Id.*

264. *Id.* at 10.

265. The court's assertion is belied by language in the *Cinque Bambini* and *Phillips Petroleum Co.* decisions. Both courts rejected the plaintiffs' claim that including non-navigable tidelands in the public trust lands would upset settled property expectations of coastal landowners. To the contrary, the courts found that Mississippi case law provided adequate notice that private property rights in coastal tideland areas extend to the mean high water mark only. See *Cinque Bambini*, 491 So. 2d at 520; *Phillips Petroleum Co.*, 484 U.S. at 482.

266. See MISS. CONST. art. 3, § 14.

267. MISS. CONST. art. 4, § 95.

268. U.S. CONST. amend. V.

269. MISS. CONST. art. 3, § 14.

270. See *supra* notes 216-23 and accompanying text.

State to draw boundaries inconsistent with the *Cinque Bambini* and *Phillips Petroleum Co.* holdings.

B. Common Law Public Trust

Even if the constitutional hurdles could be surmounted or were to be found inapplicable, Mississippi Supreme Court public trust case law requires invalidation of section 29-15-7.²⁷¹ The Mississippi Supreme Court has consistently put limits on the ability of the Legislature to alienate public trust tidelands; public policy and the state's duty to the public under traditional fiduciary principles militate strongly in favor of the Court's continuing to follow the approach set forth in *Money v. Wood*,²⁷² *Rouse v. Saucier's Heirs*,²⁷³ and *International Paper Co. of Moss Point v. Mississippi State Highway Department*.²⁷⁴

In its 1928 *Money* decision, the Mississippi Supreme Court first announced that under section 81²⁷⁵ of the state constitution, the state, as trustee, could not dispose of tidelands in a manner inconsistent with the purpose for which the trust exists.²⁷⁶ The court reasoned that section 81 aligned Mississippi with those states that prohibit conveyance in fee of trust lands to private owners for private purposes.²⁷⁷ It thus invalidated a sale of public tidelands to a private owner for the purpose of building an artificial island upon which hotels, boulevards, and private residences would be built.²⁷⁸ The Byrd facts fit squarely within *Money*. A car dealership is clearly a private business that brings a profit to the owner and only minimal benefits to the public, none of which relate to public trust uses.

Although the court in *Money* specifically declined to rule on whether the common law itself would prevent such a sale,²⁷⁹ the court's next decision five years later erased any doubt. In *Rouse v. Saucier's Heirs*, the court invalidated conveyances of tidelands made by the State Land Commissioner.²⁸⁰ In so doing, it stated that "[n]either the state nor the federal government can validly convey title in fee simple to [such] an area . . . to private owners for private purposes."²⁸¹

After a brief aberration from this position,²⁸² the court returned to its former stance. In *International Paper Co. v. Mississippi State Highway Department*,²⁸³ the court refused to give legal credence to state patents to marshlands and accreted lands that had been subject to the ebb and flow of the tide at statehood: "[T]he

271. MISS. CODE ANN. § 29-15-7 (Supp. 1989).

272. 152 Miss. 17, 118 So. 357 (1928).

273. 166 Miss. 704, 146 So. 291 (1933).

274. 271 So. 2d 395 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973).

275. MISS. CONST. art. 4, § 81.

276. 152 Miss. 29-31, 118 So. at 359-60.

277. *Id.* at 29, 118 So. at 359.

278. *Id.* at 27-32, 118 So. at 358-60.

279. *Id.* at 30, 118 So. at 292.

280. 166 Miss. 704, 705, 146 So. 291, 292.

281. 166 Miss. at 713, 146 So. at 292.¶

282. *Treuting v. Bridge & Park Comm'n*, 199 So. 2d 627 (Miss. 1967).

283. 271 So. 2d 395 (Miss. 1972).

ownership of the state was and is as trustee for the use and benefit of all the people of the state and it is not subject to conveyances to private individuals for private purposes."²⁸⁴

This position was reiterated as recently as 1986 when, in its *Cinque Bambini* decision, the court limited the state's right to alienate publicly owned tidelands to instances where a "higher public purpose" is served.²⁸⁵ Realizing this, the legislature provided such a purpose in the tidelands legislation—settling long-held property expectations.²⁸⁶ However, both the Mississippi and United States Supreme Courts rejected that same contention in their *Cinque Bambini* and *Phillips Petroleum Co.* opinions as a reason for limiting state-owned tidelands to those under waters that are navigable-in-fact.²⁸⁷ Such a position holds no more weight in the context of the 1989 legislation.

The chancery court chose to ignore the *Money* line of cases, focusing instead on the aberration, *Treuting*, which the *International Paper* court had limited to its facts.²⁸⁸ Important policy considerations support continued limitation on the *Treuting* holding. First, prohibition on alienation reflects the public will as expressed in section 95 which evidences current public sentiment in favor of such a restriction on alienation. Second, as pointed out by the Secretary of State in his brief to the chancery court, if the 1989 tidelands legislation is allowed to stand, private landowners will be unjustly enriched at the expense of the public.²⁸⁹ This resulting inequity not only offends one's sense of justice, but also amounts to an illegal breach of the state's common law fiduciary duties to the public. The Mississippi Supreme Court recently reaffirmed applicability of the common law of private trusts to the public school lands trust.²⁹⁰ There the court stated: "At common law, one who holds as trustee is prohibited from giving away, appropriating to his own use, or otherwise, disposing of the corpus of a trust in derogation of the rights of the beneficiaries."²⁹¹ The rule for public trust tidelands should be no different.²⁹² The state holds tidelands in trust for the public, a trust encompassing a

284. *Id.* at 398.

285. 491 So. 2d 508, 513 (Miss. 1986) (quoting Briefs for Appellees and Cross-Appellant at 8, 16).

286. See *supra* notes 136-38 and accompanying text which contradicts the legislature's contention that a title crisis exists.

287. See *supra* notes 5-34 and accompanying text. In addition, as argued earlier, section 95 would prohibit conveyance, even for a higher public purpose than protecting the tidelands ecosystem, if doing so amounts to a donation of the public trust property to private interests. See *supra* notes 203-30 and accompanying text.

288. 271 So. 2d at 398-99.

289. The Secretary of State goes on to assert that the legislation will award those who misappropriated tidelands, as well as "innocent purchasers" because, as recognized by the supreme court in both *International Paper* and *Cinque Bambini*, public trust case law gives sufficient indication of state ownership below the high water mark. In fact, in *International Paper*, the fact that property taxes had been paid for years on the public trust portions of the property was insufficient to validate private ownership of those lands. *International Paper*, 271 So. 2d at 399-400.

290. *Hill v. Thompson*, 564 So. 2d 1, 6 (1989).

291. *Id.* at 6. The Court here recognized that the federal government has applied a similar trust to federal public lands. *Id.*

292. See CONNORS, LAURENCE, COLUMBIA, ARCHER & BOWEN, *THE NATIONAL PUBLIC TRUST STUDY* 37-64 (1990) for a detailed discussion of applicability of charitable trust concepts to the tidelands public trust.

common law fiduciary duty that has, as with the public school lands trust, "been made more concrete . . . by the Mississippi Constitution and . . . legislative enactment."²⁹³ The question then becomes whether granting a gift of public trust tidelands to private individuals for private purposes is an action in derogation of the rights of the beneficiaries. The answer is clearly yes. Private appropriation of public land, at no cost, that ultimately precludes the public from using the land, deprives the public of all potential benefits, including economic, aesthetic, recreational, and environmental.

Third, as reflected in the Coastal Wetlands Protection Law, the state's tidelands represent a valuable resource in need of special protection.²⁹⁴ The state can best assure this protection by keeping the maximum amount of such lands in public ownership.²⁹⁵

VIII. CONCLUSION

The *Byrd* litigation presents the Mississippi Supreme Court with its first opportunity to interpret article 4, section 95 of the Mississippi Constitution in the context of public trust tidelands. The court's decision will have significant political as well as legal import. Also, it has the potential to dramatically affect the way in which the state tidelands trust is administered.

Validation of the 1989 tidelands legislation's command to the Secretary of State to, in the guise of efficiency, legally determine boundaries in a manner inconsistent with the decision of the highest courts in Mississippi and the United States tacitly gives the Legislature the power to circumvent valid pronouncements of the judiciary when it is politically expedient to do so. In addition, failure to fit provisions of the 1989 tidelands legislation squarely within the confines of section 95's prohibition on donation of public land creates two types of public lands—public trust tidelands that can be alienated at no cost to private interests and all other public lands that must be sold or leased at a reasonable price in a manner which benefits the public. It tells the public that their interest in publicly owned tidelands is less than their interest in all other public lands. Because their interest is less, the state's fiduciary duties to the public in tidelands is also less.

Finally it renders the Coastal Wetlands Protection Law a much less potent tool in managing coastal tidal resources in a manner that balances economic development with preservation of wetlands in their natural state. The primary reason for passage of the Wetlands Law was to ensure that the short-term economic interests of a few would not supersede the state's interest in protecting valuable coastal resources—hence the law's policy of leaving tidelands in their natural state unless alteration would serve a higher public interest. Declaring the settling of the economic expectations of private landowners to be a higher public purpose evis-

293. *Hill*, 564 So. 2d at 7.

294. MISS. CODE ANN. § 49-27-1 (Supp. 1989).

295. See Jarman, *Of Time, Tidelands, and Public Trust*, 57 Miss. L.J. 131 (1987). But see Comment, *The Mississippi Public Trust Doctrine: Public and Private Rights in the Coastal Zone*, 46 Miss. L.J. 84 (1975).

cerates the law's *raison d'être*. It re-balances the scale in favor of private economic interests over environmental public interests, thus opening the door for a reassertion in other contexts of private over public interests in coastal resource decision-making.

Although a number of coastal citizens and companies may experience some degree of economic loss should the Mississippi Supreme Court rule the tidelands legislation unconstitutional, the true extent of that loss is not known.²⁹⁶ However, it is highly unlikely that the economic and social impact would come near the catastrophic proportions projected in the Legislature's Preamble to the Public Trust Tidelands Legislation.²⁹⁷ On the other hand, invalidating those portions of the 1989 Tidelands Legislation that are inconsistent with section 95's prohibition on donating public lands to private persons would send a clear message to the Legislature and the people of Mississippi that the state cannot abrogate its fiduciary duties in the management of its public lands. It will force the Legislature to confront its constitutional duties and to alter them only through the appropriate legal process – in this case, through constitutional amendment.

296. No formal evidentiary hearings have been held to date to determine the true extent of the potential damage to the state's economy should tidelands filled prior to 1973 be incorporated within the public trust. See *supra* notes 120-34, 138-50 and accompanying text.

297.

[T]his dispute has cast a doubt and cloud over the titles to all littoral lands and all riparian lands along the rivers and shorelines of the coastal area to such a degree that land sales are being prevented, business and home purchasing has been made difficult or impossible, industrial financing based on such titles has become unavailable, and homeowners and other owners have been rendered apprehensive as to their security in their ownership. Economic growth and development in the coastal counties is at a virtual standstill, creating a constantly increasing and incalculable loss of dollars to the area as well as the loss of countless new jobs for the average citizens of our state.

Act approved Mar. 31, 1989, ch. 495 § 1, 1989 Miss. Laws 355 (Preamble to the Public Trust Tidelands Legislation).